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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 51

LONNIE E. SMITH
Petitioner

v.

S. E. ALLWRIGHT, Election Judge, and JAMES E. LUIZZA, Associate Election Judge, 48th Precinct of Harris County, Texas
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONER

THURGOOD MARSHALL,
New York, N. Y.
WILLIAM H. HASTIE,
Washington, D. C.,
W. J. DURHAM,
Dallas, Texas,
Attorneys for Petitioner.

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Authority for Filing

By permission of this Court granted in open court on January 12, 1944, petitioner files this reply brief addressed to the arguments submitted in this cause by the Attorney General of Texas.

ARGUMENT

I

Petitioner's Right to Relief Under Section 31 of Title 8 Remains Unchallenged

Petitioner in this case asserts three distinct statutory bases for relief, viz.: First, the remedy provided by section 41 (11) of Title 28 of the United States Code for violation of section 31 of Title 8; second, the remedy provided by section 41 (14) of Title 28 for violation of section 43 of Title 8, and third, the remedy of declaratory judgment provided by section 400 of Title 28 for violation of either section 31 or section 43 of Title 8.

The right to recover under section 31 of Title 8 does not depend on whether or not respondents were state officers or were acting under color of state law. This question can only be material in considering the applicability of section 43 of Title 8. The brief *amicus curiae* filed herein by the Attorney General of Texas is addressed to the question whether or not respondents were state officers[1] and makes no mention of petitioner's claim to recovery under section 31 of Title 8.

Section 31 of Title 8[2] is directed at the denial of the right to vote at any election because of race or color, and the official position of the individual interfering with this right is immaterial. Section 31 declares the federal right of otherwise qualified electors to vote at all elections without distinction of race or color and subdivision 11 of section 41 of Title 28 gives the District Courts jurisdiction "of all

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[1] See Brief of Attorney General of Texas, p. 2.

[2] "All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding. R. S. sec. 2004."

suits . . . to enforce the right of citizens of the United States to vote in the several States".[3]

Although section 31 does not contain specific provision for remedy for violations of the rights therein declared, there can be no doubt that section 31 in conjunction with section 41 (11) of Title 28 provides sufficient basis for recovery in the present case. In an opinion delivered by Mr. Chief Justice Hughes in a case involving the applicability of certain sections of the Railway Labor Act,[4] it was stated:

> "The absence of penalty is not controlling. The creation of a legal right by language suitable to that end does not require for its effectiveness the imposition of statutory penalties. *Many rights are enforced for which no statutory penalties are provided.* In the case of the statute in question, there is an absence of penalty, in the sense of specially prescribed punishment, with respect to the arbitral awards and the prohibition of change in conditions pending the investigation and report of an emergency board, but in each instance a legal obligation is created and the statutory requirements are susceptible of enforcement by proceedings appropriate to each . . . The right is created and the remedy exists."[5] (Italics ours.)

The necessity for and propriety of such statutory construction has most recently been affirmed by this Court in the case of *Switchmen's Union of North America* v. *National Mediation Board*[6] in the following language:

> "If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those Courts to control . . ."

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[3] See petitioner's principal brief, pp. 11, 17-18.

[4] *Texas and New Orleans R. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930).

[5] 281 U. S. 548, at p. 569.

[6] 64 S. Ct. 95 (1943).

II

The Attorney General's Approach to and Analysis of the Status of Election Judges Are Unsound

The Attorney General of Texas contends that primary election judges in Texas are not "state officers". In support of this contention he cites *Ex parte Anderson*,[7] holding that the chairmanship of a Democratic County Committee is not "an office of profit and trust within the contemplation of the laws" of Texas prohibiting the simultaneous holding of two such offices. The Attorney General also cites *Walker* v. *Mobley*,[8] holding that the statutory disqualification of any person "who holds an office of profit or trust under . . . this state" does not prevent the chairman of a Democratic County Committee from serving as an election judge. Finally, he relies upon *Walker* v. *Hopping*,[9] holding that a state constitutional provision that "all officers within this state" continue in office until their successors shall be duly qualified, does not apply to members of a Democratic County Committee.

These cases merely highlight the fallacy of testing the present issue, whether the United States Constitution restricts the official conduct of primary election judges, by analogy to cases controlled by considerations not material here. The policies which dictate the rule against holding two profitable state offices simultaneously or against a member of the administration in power judging an election have no bearing on the present issues. It is not particular local incidents of the office of election judge but the basic relationship of the state to the enterprise in which the election judge is engaged which is controlling here. As Mr. Justice Cardozo said in *Nixon* v. *Condon*:[10]

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[7] 51 Tex. Cr. Rep. 239, 102 S. W. 727 (1907).
[8] 101 Tex. 28, 103 S. W. 490 (1907).
[9] 226 S. W. 146 (Tex. Civ. App. (1920)).
[10] 286 U. S. 73, 89 (1932).

"The test is not whether the members of the Executive Committee are representatives of the State in the strict sense in which an agent is the representative of his principal. The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action".

Indeed, the Attorney General's argument would necessarily challenge the soundness of this Court's decision in *Nixon* v. *Condon*. For his contention, consistently applied, would lead to the conclusion that members of the State Democratic Executive Committee in that case should not have been considered as "acting under color of state law" and subject to the restraints of the 14th and 15th Amendments when they excluded Negroes from participating in Democratic primaries.

The only sound test of the status of the officials in question for the purpose of determining whether restrictions of the Federal Constitution apply to their official conduct is that stated in *United States* v. *Classic*:[11] "Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' state law." The analysis of the relationship of the State to Texas direct primary elections and the judges who conduct them, as set forth in pages 19 to 25, inclusive, of petitioner's principal brief, contrasted with the absence of any offsetting control by the party makes clear the applicability of this test to the official conduct of respondent primary election judges.

[11] 313 U. S. 299, 326 (1941).

III

A Qualified Negro Elector Cannot Be Denied a Primary Ballot on Any Theory That the Integrity of the Democratic Party Is Thereby Destroyed

The Attorney General of Texas has sought to establish that under Texas law and polity a political party has inherent power to determine its own membership and that this case involves no more than the exercise of such power by the Democratic party of Texas.

In the petitioner's view of the case this entire argument is beside the point. Petitioner asserts a right to participate in the choice of Senators and Representatives in Congress founded upon and guaranteed by Article I and the 17th Amendment of the Constitution of the United States. He asserts further that his privilege of voting as guaranteed by the 15th Amendment of the Constitution has been abridged. It follows from the decision of this court in *United States* v. *Classic, supra,* that an elector's constitutional right to vote for and to participate in the choice of federal officers extends to voting in primary elections which a state has made an integral part of its machinery of choice, or which in fact are decisive of the choice. Petitioner's principal brief has demonstrated that the primary elections in which he sought to vote are within these categories as set up in *United States* v. *Classic.*

Under such circumstances the abridgement of constitutional privilege is established and the claim of inherent power to do the acts which have resulted in such abridgement can be of no legal significance. Whatever power local law or local political theory may confer upon a political party with reference to the determination of its membership, that power cannot be exercised in such manner as to infringe the constitutional privilege of voting for federal officers.

In this connection it is important to note that although

the 15th Amendment prevents the abridgement of petitioner's right to vote because of color, and Article I and the 17th Amendment protect his right to participate in the choice of Senators and Representatives, this does not necessarily preclude the application of local rules of allegiance to party political tenets or a pledge to support party candidates. A requirement of adherence to the party's political faith may be reasonable and proper and compliance is within the power of the elector. Thus there is nothing inconsistent between preventing the exclusion of qualified electors from primary voting because of color and at the same time permitting a locally imposed requirement that the elector make manifestation of allegiance to party principles.

A. *Under Texas Polity the Choice of the Elector Determines His Party Affiliation*

Although the conclusions of the Attorney General of Texas concerning the nature of political parties and their inherent powers in Texas, if correct, would in no sense be decisive of the issues in this case, his conclusions are incorrect and his analysis of Texas statutes and decisions is faulty and incomplete.

It is the essence of the Attorney General's argument that unless political parties have inherent power of defining membership the party system can have no meaning. At the outset it should be pointed out that one of the fundamental facts in this case is that for all practical purposes there is only one political party in Texas and that the significant and decisive political contests occur within the Democratic party and not between or among two or more different parties.

However, there is in fact and in law, as recognized by the Texas courts, a workable method of defining the party status of the individual elector, a method adequate to serve the realities of the political situation in Texas. The party convention drafts and publishes the party platform. The his-

torical behaviour of party leaders and public officers elected on the party ticket have demonstrated the basic political principles to which the party adheres. The elector by reason of such history, or because of the party platform, or in the light of tradition, or for any other reason satisfactory to him, determines to support the Democratic ticket. He openly declares his allegiance by subscribing to the statutory pledge on the primary ballot. He affirms that he will support party candidates. By these tokens he considers himself a Democrat. It is the genius of Texas political organization, further attested by the absence of membership rolls or similar organizational devices within the party, that it is the choice of the elector rather than any action of the "party" which determines who is a Democrat. It was this conception of political status which enabled the District Judge in his trial findings in this case to find as a fact that petitioner "is a Democrat" (R. 81).

The clearest judicial exposition of this view that in Texas the voter chooses his party in accordance with his political beliefs rather than the party delimiting participation in primary elections upon some other basis appears in *Briscoe* v. *Bayle*.[12] There the Court said: "If (the qualified elector) considers himself a member of the party holding the election, and if he has a present intention to vote for the nominees selected at such election, he is entitled to vote therein, and by doing so he obligates himself to support such nominees at the resulting general election."[13]

The whole course of legislative and judicial action in Texas, except with reference to voting by Negroes, is consistent with this analysis. In *Love* v. *Wilcox*,[14] the Supreme Court of Texas has traced the history of legislation concerning primary voting. The Court there pointed out that

[12] 286 S. W. 275 (Tex. Civ. App. 1926). This decision of the Texas Court of Civil Appeals was subsequently cited and discussed with approval by the Supreme Court of Texas in the leading case of *Love* v. *Wilcox*, 119 Tex. 256, 28 S. W. (2d) 515 (1930).

[13] At page 276.

[14] Supra note 13.

the Democratic party platform of 1905 and the message to the Legislature from the Governor elected upon that platform both stressed the importance of uniform legislation to determine eligibility for voting in primary elections. It was pointed out further that in the ensuing debate the Legislature considered various restrictions and finally enacted a statute imposing the single uniform pledge of party loyalty, which is now incorporated in Article 3110 of the Texas Revised Civil Statutes. The Court then reviewed with approval several earlier decisions and concluded that the party can impose no new test of loyalty upon and can require no additional pledge of a qualified elector who seeks to vote in the party primary.

It is only where the Negro elector seeks to vote that there is any contrary legislation or adjudication. Such inconsistent rulings are made boldly and obviously. In *Briscoe* v. *Boyle, supra,* the Court of Civil Appeals in San Antonio clearly declared that a party could not exclude any *white* elector, who had complied with statutory requirements, from voting in its primary. In *County Democratic Executive Committee* v. *Booker,*[15] the same Court held that the exclusion of Negroes from voting in Democratic primary elections is within the power of the party. In *Clancy* v. *Clough,*[16] the Court of Civil Appeals at Galveston enjoined Democratic party officials from exacting of a white voter a pledge in addition to that prescribed by statute. But, in *White* v. *Lubbock,*[17] the same Court in the same volume of reports declared the inherent power of the party to exclude Negroes from primary voting.

Similarly, the Supreme Court of Texas concluded in the leading case of *Love* v. *Wilcox, supra,* after elaborate review of legislative and judicial history, that neither past party disloyalty nor new forms of pledges as to fealty may bar

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[15] 53 S. W. (2d) 123 (1935).
[16] 30 S. W. (2d) 569 (Tex. Civ. App. 1928).
[17] 30 S. W. (2d) 722 (Tex. Civ. App. 1930).

or impede the elector who seeks to vote in a party primary. Yet in *Bell* v. *Hill*,[18] the State Supreme Court determined that the party has inherent power to exclude Negroes from primary elections. It has already been pointed out in petitioner's principal brief that *Bell* v. *Hill* was decided on motion for leave to file a petition for writ of mandamus without the taking of testimony as to party structure or functioning. But beyond that, the report of the case shows that the motion for leave to file a petition for mandamus was presented to the Court on July 19 and the Court's decision was rendered the following day, July 20.

The Texas decisions in this field make clear two things and two things only; first, the courts of Texas are determined to sanction the exclusion of Negroes from voting in Democratic primaries; second, these same courts are equally determined that no other qualified electors shall be excluded.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

THURGOOD MARSHALL,
New York, N. Y.,
WILLIAM H. HASTIE,
Washington, D. C.,
W. J. DURHAM,
Dallas, Texas,
Attorneys for Petitioner.

[18] 123 Tex. 531, 74 S. W. (2d) 113 (1934).